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In the Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION, PETITIONER

v.

CENTRAL GULF LINES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an agent who procures and pays for necessary maritime supplies for a vessel in maritime commerce is entitled to assert a maritime lien against the vessel.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. For 40 years, petitioner Exxon Corporation was Waterman Steamship Corporation's exclusive worldwide supplier of bunker fuel oil. Pursuant to contract, petitioner supplied the fuel to Waterman vessels either directly or, when Waterman vessels called at ports where petitioner did not maintain its own bunker stations, through local suppliers. When a local supplier was used, the fuel was delivered by the local supplier directly to the vessel; petitioner paid the supplier and then billed Waterman. Pet. App. A23-A24.

The vessel M/V Green Harbour ex William Hooper ("the Hooper") is a United States flag ship owned by respondent Central Gulf Lines, Inc. Waterman chartered the vessel for use in its common carrier service between United States ports and ports in the Middle East. On October 26, 1983, Arabian Marine Operating Co., Ltd., a local supplier of fuel at the port in Jeddah, Saudi Arabia, delivered 4,242.47 tons of bunker fuel to the Hooper, as contemplated by the agreement between petitioner and Waterman. Petitioner accordingly paid Arabian Marine for the fuel, and then billed Waterman for its $763,644 cost. Pet. App. A24-A25.

2. Waterman, however, was insolvent; on December 1, 1983, the company sought reorganization under Chapter 11 of the bankruptcy laws. During reorganization proceedings, respondents Central Gulf agreed that, should a court hold the Hooper liable in rem for the cost of the bunker fuel, respondent would assume personal liability for the cost of the fuel. Respondent provided petitioner with a letter of credit, as security for this promise. Pet. App. A25.

After a reorganization plan for Waterman was confirmed in June 1986, petitioner was permitted to pursue its claim for the cost of supplying bunker fuel to the Hooper. Accordingly, it commenced this lawsuit in federal district court against both Central Gulf and the Hooper. Pet. App. A25. Petitioner urged that its agreement with Waterman to procure bunker fuel in Saudi Arabia fell within the district court's admiralty jurisdiction, and therefore claimed to have a maritime lien upon the Hooper, pursuant to the Federal Maritime Lien Act, 46 U.S.C. 971 (1982 & Supp. V 1987).

3. The district court recognized (Pet. App. A27, A30-A31) that as a prerequisite to the existence of a maritime lien, the subject matter of the contract in dispute must

fall within the court's admiralty jurisdiction. The court noted that "[w]hile admiralty jurisdiction provides 'fairly complete coverage of the primary operational and service contracts of the shipping industry,' there still exist 'a few anomalous exceptions' * * * [including] the rule that agency contracts under which a party agrees to solicit or procure freight, passengers, crew, or supplies for a vessel are not maritime contracts." *Id.* at A28, quoting G. Gilmore & C. Black, *The Law of Admiralty* § 1-10 (2d ed. 1975). The district court observed (Pet. App. A28) that the Second Circuit, in *Peralta Shipping Corp.* v. *Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (1984), cert. denied, 470 U.S. 1031 (1985), had refused to discard this exception, finding itself bound by this Court's decision in *Minturn* v. *Maynard,* 58 U.S. (17 How.) 477 (1855). Applying "the principles enunciated in *Peralta*" to the facts of this case (Pet. App. A29), the district court concluded that the agreement whereby petitioner arranged for the provision of fuel to Waterman's vessels at Jeddah constituted an agency contract (*id.* at A29-A30), and that there was no legitimate basis for distinguishing the general agency, or husbanding, contract at issue in *Peralta*[1] from the bunkering agreement here (*id.* at A31).

The court denied petitioner's motion for reconsideration (Pet. App. A3-A21), observing that although the *Minturn* rule had "suffered some erosion in other circuits," the Second Circuit had refused to depart from *Minturn* absent

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[1] "[G]eneral agency contracts that call for 'husbanding' a vessel [involve] arranging for the performance of the various services that are preliminary to maritime movement." *Peralta Shipping Corp.* v. *Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031 (1985) (Blackmun, J., dissenting from denial of certiorari). Thus, in *Peralta,* the agreement under consideration "provided services such as arranging for fuel, water, provisions, customs clearance, and stevedoring," mostly to be performed by others than the contracting parties. Pet. App. A28-A29.

action by this Court (*id.* at A11-A12). The district court rejected petitioner's argument that in procuring bunkering services for Waterman, it was acting as a special and not a general agent (*id.* at A13); it then went on to observe that the Second Circuit had refused to distinguish special agency agreements from general ones, and that in any event, special agents that provide preliminary services are outside the admiralty jurisdiction (*id.* at A13-A14).[2] It specifically held that the "services performed by [petitioner at Jeddah] were merely preliminary." (*id.* at A17).[3]

4. The court of appeals affirmed, "substantially for the reasons given in [the district court's] two thorough opinions" (Pet. App. A2).

DISCUSSION

In reaching the conclusion challenged by petitioner, the courts below relied to a significant extent on this Court's

[2] The district court rejected petitioner's invitation to "disentangle the preliminary contract rule from the general agency rule," observing that "the agency exception to maritime jurisdiction is less of an anomaly when viewed as a subset of the preliminary contract doctrine." Pet. App. A16-A17. See *id.* at A29 (quoting *The Thames,* 10 F. 848 (S.D. N. Y. 1881)):

> The distinction between preliminary services leading to a maritime contract and such contracts themselves ha[s] been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, I do not perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more or less near or remote, to navigation and commerce. If the broker of a charter-party be admitted, the insurance broker must follow, – the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed.

[3] The district court also rejected petitioner's claim that it was entitled to an admiralty lien by virtue of subrogation (Pet. App. A18-A21). Petitioner does not seek further review of that claim.

decision in *Minturn* v. *Maynard,* 58 U.S. (17 How.) 477 (1855). That decision, largely unexplained and perhaps questionable even when written, has been much criticized by courts and commentators, and its probable rationale may well be inconsistent with subsequent developments in admiralty jurisdiction. Moreover, the decision has spawned considerable confusion in the lower courts, which are in disagreement over its meaning and over the relevant distinctions to be drawn in determining the scope of admiralty jurisdiction. Although it is not certain that this case would have been decided differently in any other circuit, we submit that it is nevertheless an appropriate vehicle for considering the present validity and reach of the *Minturn* decision. We therefore recommend that the petition for a writ of certiorari be granted.

1. Justice Story observed early in the nineteenth century that the admiralty jurisdiction of the United States includes "all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." *De Lovio* v. *Boit,* 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3,776). Whether a contract is governed by maritime law thus depends on the subject matter of the agreement. See *North Pacific S.S. Co.* v. *Hall Bros. Marine Ry. & Shipbuilding Co.,* 249 U.S. 119, 125 (1919) ("in matters of contract it depends upon the subject matter * * * the true criterion being the nature of the contract, as to whether it have reference to maritime service or maritime transactions"); *Kossick* v. *United Fruit Co.,* 365 U.S. 731, 736 (1961) ("The only question is whether the transaction related to ships and vessels, masters and mariners as agents of commerce."). Accord, *e.g., Hamburg-Amerika Line* v. *Gulf Puerto Rico Lines, Inc.,* 579 F.2d 115, 118 (1st Cir. 1978); *Owens-Illinois, Inc.* v. *United States Dist. Court,* 698 F.2d 967, 970 (9th Cir. 1983); *CTI-Container*

Leasing Corp, v. *Oceanic Operations Corp.*, 682 F.2d 377, 379 (2d Cir. 1982).[4]

Minturn v. *Maynard, supra,* has been read to establish an "agency" exception to this general rule. The libellant in *Minturn* was both a general agent and a broker; he sued in personam to recover from a vessel's owners money he had spent in procuring ship's services and supplies. This Court dismissed the suit in a brief opinion, finding "nothing in the nature of a maritime contract in the case." 58 U.S. (17 How.) at 477. The Court's entire explanation for this conclusion (*ibid.*) was this:

> The libel shows nothing but a demand for a balance of accounts between agent and principal, for which an action in *assumpsit,* in a common law court, is the proper remedy. That the money advanced and paid for respondents was, in whole or in part, to pay bills due by a steamboat for repairs or supplies, will not make the transaction maritime, or give the libellant a remedy in admiralty. Nor does the local law of California, which authorized an attachment of vessels for supplies or repairs, extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge, or security of the vessel.

[4] Nevertheless, as this Court has noted, "[t]he boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw." *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 735 (1961). See S. Friedell, *Benedict on Admiralty* § 183, at 12-8 (7th ed. 1989) ("principles used to define maritime contracts * * * [are] easier to state than to apply"). It is therefore not surprising that decisions marking this boundary are difficult to reconcile. It has been held, for example, that a contract to repair a vessel is maritime, *New Bedford Dry Dock Co.* v. *Purdy,* 258 U.S. 96 (1922), yet a contract to build a vessel is not, *Thames Towboat Co.* v. *The Schooner "Francis McDonald",* 254 U.S. 242 (1920), *People's Ferry Co.* v. *Beers,* 61 U.S. (20 How.) 393 (1858); and while a lease of cargo containers for use on a ship is maritime, *CTI-Container Leasing* v. *Oceanic Operations, supra,* as is a contract to purchase equipment for a ship, *e.g., Radiomarine Corp.* v. *Gulf Northern Co.*, 394 F. Supp. 381 (E.D. Mo. 1975) (radio and radar systems), a contract to purchase a vessel is not. *Economou* v. *Bates,* 22[illegible] F.Supp. 988 (S.D.N.Y. 1963). Cf. *Sisson* v. *Ruby,* 110 S.Ct. 2892, 2901 & n.4 (1990) (Justice Scalia, joined by Justice White, concurring in result and noting "[t]he impossibility of drawing a principled line with respect to what, in addition to the fact that the contract relates to a vessel * * * is needed in order to make the contract itself 'maritime.' ").

Analysis of *Minturn* should proceed from an understanding of its historical context. In colonial times, only contracts entered into on the high seas and to be performed on the high seas were deemed within admiralty's jurisdiction in England. See Coke, *The Fourth Part of the Institutes of the Laws of England Concerning the Jurisdiction of the Courts* 137 (6th ed.) (London 1681); Robertson, *Admiralty and Federalism* 56-58 (1970); *De Lovio* v. *Boit,* at 421.

England's narrow interpretation of admiralty jurisdiction was rejected in America's colonial courts and subsequently in the courts of the United States. See generally, *De Lovio* v. *Boit, supra.* However, the principle that admiralty jurisdiction was limited to the high seas, and only so far inland as the ebb and flow of the tides, remained a viable doctrine in this country during the first half of the nineteenth century.[5] For example, Justice Story, writing

[5] Observance of this principle may have been in part due to a concern for State's rights. In 1826, Chancellor Kent observed that

> If the admiralty and maritime jurisdiction of the district courts embrace all maritime contracts, then suits upon policies of insurance, charter-parties, maritime hypothecations, contracts for building, repairing, supplying, and navigating ships, and contracts between part owners of ships, must be tried in the admiralty by a single judge, to the exclusion of the trial by jury; and the state courts would be divested, at one stroke, of a vast field of commercial jurisdiction. [1 Kent, *Commentaries,* 372 (12th ed. 1873)].

for this Court, adhered to the so-called "tidewater limitation," *i.e.*, that admiralty jurisdiction extended only so far as the sea and the tidewaters, "as far as the tide flows." See *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825); *United States* v. *Coombs*, 37 U.S. (12 Pet. 72, 76 (1838). Writing in 1848, Justice Nelson encapsulated American admiralty law's suzerainty over matters of contract as follows (*New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47 U.S. (6 How.) 344, 392 (1848) (emphasis added)):

> On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved, or came under its observation, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject matter of the contract, whether it was a maritime contract, and the service a maritime service, *to be performed upon the sea, or upon waters within the ebb and flow of the tide.*

Thus, as Professor Moore has noted, "some remnant of the restrictive English mentality regarding the admiralty appears to have been present in the minds of the court that decided the early cases." 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .250, at 3004-3005 n.10 (2d ed. 1985). The *Minturn* Court's decision may be an example of this tendency, reflecting the fact that the contract there at issue was not one to be performed on the high seas, or within the ebb and flow of the tide.

Alternatively, one commentator has remarked that at the time *Minturn* was decided, it was deemed necessary to have a lien interest in a vessel before a contract would be considered maritime. See Note, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn. L. Rev. 595, 603 (1985). The *Minturn* Court specifically noted that the "agent and principal [there involved] ha[d] never dealt on

the credit, pledge, or security of the vessel," 58 U.S. (17 How.) at 477, *i.e.*, the libellant never had a lien interest in the vessel. That fact may thus have provided a basis for the Court's rejection of admiralty jurisdiction.

Both of these possible rationales for *Minturn* were rejected by this Court shortly after *Minturn* was decided. In 1851, three years after *Minturn*, this Court held in *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, that admiralty jurisidiction extended to all navigable waters, and was not limited to waters within the ebb and flow of the tide. In *Insurance Co.* v. *Dunham*, 78 U.S. (11 Wall.) 1, 26 (1871), the Court held that "as to contracts * * * the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions," and established that a contract may be maritime, and give rise to a right to sue on the contract in personam, even when the contract does not create a lien. *Minturn* therefore rests on concepts long abandoned in American admiralty law.[6]

Despite these developments in the law of admiralty, *Minturn* has stood for almost 140 years without reconsideration by the Court. Not surprisingly, however, it has been repeatedly criticized by commentators. Professor Moore has observed that the *Minturn* rule is an unfortunate anomaly: "Quite clearly, such [general agency] agreements are an integral part of, and in furtherance of, maritime commerce and, consequently, should be cognizable within

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[6] Those concepts appear to have been abandoned in English admiralty law as well. An English admiralty court today would find a contract for the supply of fuel to a ship well within its jurisdiction. See Supreme Court Act 1981, § 20(2)(m), 51 Halsbury's *Statutes of England* 612-613 (3d ed. 1981) (extending admiralty jurisdiction to claims for goods and materials supplied to a ship for its operation and maintenance); *The D'Vora*, 2 All E.R. 1127 (P.1952) (holding that fuel is clearly material supplied to a ship for its operation).

the admiralty jurisdiction of the district courts." 7A J. Moore & Palaez, *Moore's Federal Practice* ¶ .250, at 3006 (2d ed. 1985). And Professors Gilmore and Black have characterized the general agency exception as "of dubious defensibility," and predicted "that the Supreme Court, when the issue reaches it, will hold 'general agency' and other vessel agreements within the jurisdiction—along with actions for accountings on them." G. Gilmore & C. Black, *The Law of Admiralty* 28, n. 94b (2d ed. 1975).[7]

2. In light of these criticisms, this Court's reconsideration of the *Minturn* decision might well be warranted, even in the absence of any disagreement over its meaning in the lower courts. But such disagreement does exist. As Justice Blackmun, joined by Justice Marshall, noted in dissenting from the denial of certiorari in *Peralta, Minturn* is an exception to admiralty jurisdiction "that has been applied inconsistently and that has created unnecessary confusion in the federal courts." 470 U.S. at 1031-1032. Since "uniformity and predictability in the maritime industry were the ends sought in the Constitution when federal-court maritime jurisdiction was created in the first instance," this inconsistency is particularly inappropriate in the admiralty

[7] See also S. Friedell, *Benedict on Admiralty* § 183, at 12-9 (7th ed. 1989) (noting that "general agency agreements * * * are 'intimately related to the shipping industry and would warrant inclusion within admiralty,'" quoting *Peralta*). C. Black, *Admiralty Jurisdiction: Critique and Suggestions,* 50 Colum. L. Rev. 259, 274 (1950) (suggesting that admiralty jurisdiction should extend to all cases "involving the enforcement, policing or adjustment of business arrangements as a practical matter primarily concerned with sea, lake and river transport"); Hough, *Admiralty Jurisdiction Of Late Years,* 37 Harv. L. Rev. 529 (1924); Note, *General Agency Agreements and Admiralty Jurisdiction,* 17 Conn. L. Rev. 595, 627 (1985) (suggesting that general agency agreements should be within admiralty jurisdiction unless agent merely procures, but does not perform or pay for services or supplies).

context (*id.* at 1034).[8] Accordingly, the instant decision—and others rendered since the decision in *Peralta*—serve to buttress the need for review by this Court.

As evidenced by this decision, the Second Circuit remains committed to the view that under *Minturn,* agency agreements are excluded from admiralty jurisdiction. See Pet. App. A11-A16, A31; accord *Peralta Shipping Corp.* v. *Smith & Johnson (Shipping) Corp.,* 739 F.2d 798, 802-804 (2d Cir. 1984), cert. denied, 470 U.S. 1031 (1985); *Admiralty Oriental Line* v. *Atlantic Gulf & Oriental S.S. Co.,* 88 F.2d 26, 27 (2d Cir. 1937). Cf. *Ingersoll Milling Mach. Co.* v. *M/V Bodena,* 829 F.2d 293, 301-302 (2d Cir.1987); *Cory Bros. & Co.* v. *United States,* 51 F.2d 1010, 1012 (2d Cir. 1931).[9] Although it has stated that it would "welcome" the overruling of *Minturn* (*Peralta,* 739 F.2d at 804), the Second Circuit has rejected a variety of distinctions that limit the impact of that decision in other circuits, noting—with some accuracy—that "such hair-splitting distinctions would blur, if not obliterate, a rather clear admiralty demarcation" (*ibid.*).[10] Moreover, in this

[8] See also *Sisson* v. *Ruby,* 110 S. Ct. 2892, 2898 (1990) ("The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or non-commercial".); *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149, 160 (1920); 3 *Elliot's Debates on the Federal Constitution* 532, 571 (2d ed. 1836).

[9] The Eleventh circuit agrees with the Second. *E.S. Binnings, Inc.* v. *M/V Saudi Riyadh,* 815 F.2d 660, 662-665 (11th Cir. 1987).

[10] In *Peralta* (739 F.2d at 803-804), the Second Circuit refused to "subdivid[e] the category of general agency contracts based on the degree of importance of the services rendered by the agent or on the extent of supervision of performance," as the Ninth Circuit "arguably" did in *Hinkins Steamship Agency* v. *Freighters Inc.,* 498 F.2d 411 (1974). The Second Circuit also criticized the *Hinkins* distinction between general and special agency agreements (739 F.2d at 803 n. 4). Accord *Continental Cameras Co.* v. *FOA & Son Corp.,*

case the district court found no reason to distinguish the agreement at issue here—to procure bunkering services—from a general agency contract (Pet. App. A31, A16-A17), and the court of appeals agreed (*id.* at A2).

At the other end of the spectrum, the Fifth Circuit has refused to recognize any rule excluding agency agreements from admiralty jurisdiction. In *Hadjipateras* v. *Pacifica, S.A.*, 290 F.2d 697, 703 (1961), the Fifth Circuit held that an action for breach of an agency contract for the management and operation of a vessel is within the admiralty jurisdiction, since "the contract is everything classically known as a maritime contract. It concerns a ship. It relates not only to a ship; its very purpose is to effectuate the physical, economic operation and employment of a vessel." In so holding, the court observed that *Minturn* merely forecloses admiralty jurisdiction over an action for "an accounting as such" (290 F.2d at 704 & n.15).[11]

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658 F. Supp. 287, 289 (S.D.N.Y.), aff'd, 831 F.2d 45 (2d Cir. 1987); Pet. App. A13-A16.

[11] The Eleventh Circuit has suggested that *Hadjipateras* must be read in light of the particular provisions of the contract before the court in that case, noting that "[t]he agreement involved in *Hadjipateras* was a vessel management agreement, not a general agency agreement. The core of that agreement was the actual physical operation of the vessel by the agent." *E.S. Binnings, Inc.* v. *M/V Saudi Riyadh*, 815 F.2d 660, 664 (1987). See also *CTI-Container Leasing Corp.* v. *Oceanic Operations Corp.*, 682 F.2d 377, 380 n. 4 (2d Cir. 1982) (*Hadjipateras* establishes that "a contract for managing a ship is within [admiralty jurisdiction]"). The Fifth Circuit's citations to *Hadjipateras* in the admiralty context have simply referred to it as authority for the proposition that admiralty courts may award equitable relief. See, *e.g.*, *Inland Credit Corp.* v. *M/T Bow Egret*, 552 F.2d 1148, 1153 n.6 (1977); *Cates* v. *United States*, 451 F.2d 411, 414 n.8 (1971); *Florida Bahamas Lines Ltd.* v. *Steel Barge "Star 800"*, 433 F.2d 1243, 1247 (1970). Nevertheless, it is by no means clear that the Fifth Circuit would limit its holding in *Hadjipateras* in the manner suggested by the Eleventh Circuit.

Similarly, the Ninth Circuit, in *Hinkins Steamship Agency* v. *Freighters, Inc.*, 498 F.2d 411 (1974), questioned *Minturn*'s continued validity (*id.* at 412), and found the agency agreement at issue there to be a maritime contract. The Ninth Circuit emphasized that although the husbanding agent had "*procured* [maritime services] and did not perform them directly, * * * [the facts that] their performance was its direct responsibility, that the services were clearly maritime and necessary for the continuing voyage, and that [the agent] was directly engaged in supervision, makes [the service] maritime and the contract sued upon a maritime contract"—particularly since the agreement was limited to a specific voyage[12] and "there was repeated attendance on board the vessel" by the agent. *Ibid.*[13]

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[12] The Eleventh Circuit in *Binnings* relied on this distinction, noting that in *Hinkins*, the contract was for "service as husbanding agent * * * for one ship in connection with a specific voyage, * * * [where] the husbanding services were supervised directly by the husbanding agent." 815 F.2d at 665. A subsequent citation to *Hinkins* in the Ninth Circuit characterizes it as holding that a "contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, is subject to maritime law and falls under admiralty jurisdiction." *Foss Launch & Tug Co.* v. *Char Ching Shipping*, 808 F.2d 697, 699 (1987).

[13] In an earlier case, *The Golden Gate* v. *Associated Oil Co.*, 52 F.2d 397 (1931), the Ninth Circuit, without citing *Minturn*, the preliminary contract rule, or the related cases, affirmed a decree in rem against the Golden Gate for the value of oil furnished to it by libellant, finding it "immaterial" that delivery of the oil was made by a third party, "[i]nasmuch as the contract of sale was between the libellant and the charterer, and the supplies were furnished by the libellant pursuant thereto." 52 F.2d at 400. See also *Gulf Trading & Transp. Co.* v. *M/V Tento*, 694 F.2d 1191 (9th Cir. 1982) (apparently assuming that under U.S. law, fuel broker may assert admiralty lien for fuel it procured and paid for). Similarly, although the First Circuit has not discussed the issue, it noted in *Tramp Oil & Marine, Ltd.* v. *M/V Mermaid I*, 805 F.2d 42, 44 (1st Cir. 1986)—in a situation in which Exxon

The circuits are thus in disagreement about whether admiralty jurisdiction extends to certain types of contracts—for example, although the Second Circuit in *Admiral Oriental Line,* found a "managing operator" agency contract was not within admiralty jurisdiction, the Ninth Circuit in *Hinkins* reached a contrary result, precisely because the contract before it provided for direct management services. See *Peralta,* 739 F.2d at 804. And there is little doubt, in light of *Admiral Oriental Line* and *Peralta,* that the Second Circuit would have reached a different result from that reached by the Fifth Circuit in *Hadjipateras.* Moreover, *Hadjipateras* itself at least suggests that the Fifth Circuit would find the typical husbanding agreement—like the one at issue in *Peralta,* for example—to be subject to admiralty jurisdiction, although it has not apparently had occasion to do so to date. See note 11, *supra.*

It is not certain that the present case would have been decided differently had it arisen in any other circuit.[14] The agreement under which petitioner procured and paid for the bunkering services provided to the Hooper did not provide for any direct management of Waterman's ships

"caused Colonial Oil Industries, Inc. (Colonial) to supply • • • oil to the Mermaid,"—that "[n]o one disputes that Exxon and Colonial, as direct suppliers of the fuel to the Mermaid, would be entitled to a maritime lien." That issue was not in dispute, since both Exxon and Colonial had been paid in full.

[14] In the district court, petitioner strenuously contested the characterization of its agreement to procure bunkering services for Waterman as an agency contract, but it does not renew that objection in this Court. We accordingly accept, for purposes of our analysis, the district court's conclusion that the relevant contractual provisions established that petitioner was acting as Waterman's agent in procuring bunkering services where it did not have the appropriate facilities to provide those services directly.

by petitioner, as did the *Hadjipateras* agreement.[15] And many of the factors found significant by the Ninth Circuit in *Hinkins* in establishing admiralty jurisdiction are absent in this case.[16] (But the results of the Ninth Circuit decisions cited at note 13, *supra,* do appear to be more directly in conflict with the decision below.)

Even if this Court were to decide in this case that agency agreements are not *per se* excluded from admiralty jurisdiction, difficult questions would remain. For example, many agency agreements would undoubtedly properly be excluded from admiralty jurisdiction on the ground that they provide for services that are merely preliminary to maritime transactions. See, *e.g.,* S. Friedell, *Benedict On Admiralty* § 183 (7th ed. 1989).[17]

[15] Even assuming that the Fifth Circuit would, if faced with an appropriate case, adhere to its broad language in *Hadjipateras,* it might conclude that this case involves a suit for "an accounting as such," still foreclosed by *Minturn.* 290 F.2d at 704. Like the appellant in *Minturn,* petitioner simply seeks recovery of sums allegedly "advanced and paid for respondents • • • to pay bills due by a [vessel] for • • • supplies." 58 U.S. at 477.

[16] Petitioner engaged in no direct supervision of Waterman's vessels, had no direct relationship to any specific vessel or voyage, and, although it procured and paid for the bunkering services, title to the oil provided passed directly from Arabian Marine, the supplier, to Waterman. On the other hand, although the district court in the present case was "persuaded that [petitioner] was Waterman's general agent with respect to fuel supplies," (Pet. App. A13), a circuit anxious to assert admiralty jurisdiction and finding the distinction useful might well have focused on the fact that the dispute concerned only the provision of fuel to the Hooper at Jeddah, and might therefore have concluded that a special agency agreement was at issue.

[17] The Second Circuit has consistently viewed the general agency rule it derives from *Minturn* as a particular application of the preliminary contract rule. See Pet. App. A16-A17. It has, moreover, noted that "[t]he distinction between 'preliminary' and maritime contracts has also become somewhat blurred." *Peralta,* 739 F.2d at 803 n.4. The district court, observing that "[i]t would be inappropriate for me to

Nevertheless, we believe this case is an appropriate vehicle for reconsideration of the Court's holding in *Minturn* and for resolution, at least in part, of the conflict in approach among the circuits. First, and most important, the courts below plainly thought themselves constrained by *Minturn*—in ways in which other circuits would not—from determining whether and to what extent agency agreements fall within admiralty jurisdiction.[18] Second, if this Court determines that agency agreements are not necessarily precluded from the scope of admiralty, the Second Circuit in this case, as well as other circuits in comparable cases, will be free to focus on whether a particular agency agreement falls outside admiralty jurisdiction because it is truly "preliminary" and not simply because it involves an agent-principal relationship. See notes 2, 17, *supra*.

The Court may eventually conclude that on balance, the interests of certainty and predictability are best served by reaffirming the longstanding *Minturn* rule. Cf. *Sisson* v. *Ruby*, 110 S. Ct. at 2901 & n.4 (Scalia, J., concurring). But even if the Court ultimately so concludes, the controversy over the desirability of that rule, and the disagree-

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disentangle the preliminary contract rule from the general agency rule," concluded that "the services performed by [petitioner] were merely preliminary." Pet. App. A16-A17. If this Court should overturn *Minturn*, thus "disentangling" the general agency issue, it would be appropriate for the courts below to reconsider the preliminary contract issue. The question would be whether the present contract, under which petitioner not only procured but also paid for the delivery of fuel to Waterman's vessel, is any more "preliminary" than an arrangement under which petitioner itself sold the oil to Waterman—an arrangement that the district court recognized as falling within admiralty jurisdiction. Pet. App. A33.

[18] The continuing existence of this constraint could well encourage forum shopping by those wishing to assert a maritime lien, in the belief that the chances of succeeding in that effort are greater in the Fifth or Ninth Circuits.

ment over its precise scope, warrant review by this Court. See 470 U.S. 1031 (1985) (Blackmun, J., dissenting from the denial of certiorari in *Peralta*).

In sum, we believe that the continuing validity and, if valid, the scope of the *Minturn* decision is ripe for review by this Court, and that this case presents an appropriate vehicle for that review.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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